



July 8, 2002

Ms. Zandra L. Narvaez
Attorney
Legal Services Division
City Public Service of San Antonio
P.O. Box 1771
San Antonio, Texas 78296-1771

OR2002-3691

Dear Ms. Narvaez:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 164695.

City Public Service of San Antonio, Texas ("CPS") received a request for various information pertaining to a construction management contract for a Primary Control Center. You explain that except for proposals submitted to CPS by each of four private companies, all of the requested information has been released. With respect to the four proposals, which you have submitted for our review, you state that CPS "takes no position" on whether this information is excepted from required disclosure. However, you notified each of the following four private companies of the request, in accordance with section 552.305 of the Government Code,¹ inviting each to submit arguments to this office: G.W. Mitchell & Sons, Inc. ("G.W."), Project Control of Texas ("Project"), Square One Consultants ("Square One"), and Zachry Construction Corporation ("Zachry"). We have considered the claimed exceptions and submitted arguments and we have reviewed the submitted information.

Initially, we address a procedural matter. You inform this office that CPS received the request on April 4, 2002. You did not request a decision from this office, however, until correspondence dated June 17, 2002. Section 552.301 of the Government Code sets forth a deadline of ten business days after a governmental body's receipt of a written request for the governmental body to both request a decision from this office and to notify the requestor

¹See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain exceptions to disclosure in certain circumstances).

that such a decision has been requested. Gov't Code § 552.301(b), (d). The governmental body must also submit certain additional information to this office no later than the fifteenth business day after its receipt of the written request. *Id.* § 552.301(e). CPS did not comply with these deadlines, and therefore did not request a decision as provided by section 552.301. Because of this, section 552.302 provides that the requested information "is presumed to be subject to required disclosure and must be released unless there is a compelling reason to withhold the information." Gov't Code § 552.302; *see also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ); Open Records Decision No. 630 (1994). Such a "compelling reason" is demonstrated only where the information at issue is confidential by law, such that the governmental body is prohibited from releasing it, or where the release of the information implicates third party interests. *See, e.g.,* Open Records Decision No. 150 (1977).

With respect to the proposals of G.W., Project, and Zachry, none of these companies submitted any arguments in response to the respective section 552.305 notices. We thus have no basis to conclude that any of the information in the respective proposals of G.W., Project, or Zachry is proprietary information. *See* Open Records Decision Nos. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Accordingly, we conclude that the proposals of G.W., Project, and Zachry may not be withheld under section 552.110 of the Government Code.

Square One did respond to the section 552.305 notice and asserted sections 552.101 and 552.110 of the Government Code. Because both of these claimed exceptions may provide a compelling reason that is sufficient to overcome the section 552.302 presumption of openness, we shall address Square One's arguments.

Section 552.110 excepts from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a), (b).

With respect to a claim of trade secret under section 552.110(a), the Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving

materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the above definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).² This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

With respect to an assertion of section 552.110(b), the governmental body or interested third party is required to provide a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from disclosure of the information at issue. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Square One asserts trade secret protection for much of the information in its proposal, and in its arguments has addressed the above-quoted definition of trade secret. However, Square One did not submit any comment in support of such trade secret factors as the extent to which the information at issue is known outside of Square One, the extent to which it is known by employees and others involved in Square One's business, or the extent of measures taken by Square One to guard the secrecy of the information. We accordingly conclude that Square One has not made a *prima facie* case for trade secret protection.

²The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

Square One also argues the applicability of section 552.110(b), and we believe that Square One has made a specific factual or evidentiary showing of likely competitive harm for much of the information in Square One's proposal. We have marked this information, which includes the identities of Square One's customers as well as certain details regarding Square One's business methodologies.³ We conclude that CPS must withhold under section 552.110 of the Government Code the information contained in Square One's proposal that we have marked.⁴ None of the remaining information at issue, however, is excepted from disclosure on the basis of section 552.110.

For a small portion of information that we conclude is not excepted under section 552.110, Square One asserts section 552.101 and argues that "special circumstances" exist for withholding the information. *See* Open Records Decision No. 169 (1977). Specifically, Square One asserts that the information at issue, if released, could allow an enterprising individual to circumvent security measures "and thus pose a threat" to public safety.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." In Open Records Decision No. 169 (1977), we considered the personal safety concerns of public employees, and we recognized that there may be specific instances where "special circumstances" exist.

Here, we have no indication that CPS has made any determination of the existence of credible threats or safety concerns. The confidential by law argument was advanced only by the third party, Square One. Moreover, we note that Square One concedes in its comments that none of the information at issue contains any "specifics regarding plans for security systems [or] blueprints of the building[.]" The information at issue is entirely general in nature and reveals little more than the fact that the Primary Control Center will have a security system. We thus conclude that special circumstances are not demonstrated and none of the information may be withheld on that basis.⁵

³In connection with its arguments, Square One submitted to this office a Bates stamped copy of its proposal. The pages in this copy of the proposal that are stamped "000064" through "000071," however, are not also contained in the copy of Square One's proposal that CPS submitted to this office. Because the information at issue is that held by CPS, this decision does not address the claimed exceptions for any information submitted to this office by Square One as responsive to the request that was not also submitted to this office by CPS as responsive to the request.

⁴For the convenience of both Square One and CPS, we have marked both Square One's copy of the proposal as well as CPS's copy of the proposal in identical fashion.

⁵Square One most forcefully argues the existence of special circumstances for information contained on pages 50 through 54 of Square One's copy of its proposal. We concluded *supra* that this information must be withheld under section 552.110.

Finally, we address certain e-mail addresses contained in the proposals of Square One and G.W., which we have marked. Section 552.137 of the Government Code provides in relevant part:

Sec. 552.137. CONFIDENTIALITY OF CERTAIN E-MAIL ADDRESSES.

(a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. You do not inform us that the members of the public whose e-mail addresses are at issue have affirmatively consented to the release of their addresses. Therefore, we conclude that CPS must withhold the e-mail addresses we have marked, pursuant to section 552.137.

In summary, absent affirmative consent to release from the holder of the e-mail address, CPS must withhold the e-mail addresses we have marked, pursuant to section 552.137. CPS must also withhold the information we have marked in Square One's proposal, pursuant to section 552.110. CPS must release all of the remaining information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records

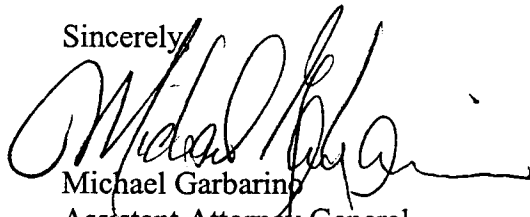
will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael Garbarino
Assistant Attorney General
Open Records Division

MG/seg

Ref: ID# 164695

Enc. Submitted documents

c: Mr. Roddy Stinson
San Antonio Express-News
P.O. Box 2171
San Antonio, Texas 78297-2171
(w/o enclosures)

Ms. Susan C. Rocha
Denton, Navarro & Bernal
310 South St. Mary's Street, Suite 1700
San Antonio, Texas 78205-3111
(submitted documents enclosed)

Mr. Kevin Fleming
President
Square One Consultants, Inc.
3536 Bee Cave Road, Suite 212
Austin, Texas 78746
(w/o enclosures)

Mr. William F. Mitchell
President
G.W. Mitchell & Sons, Inc.
2002 North St. Mary's Street
San Antonio, Texas 78212
(w/o enclosures)

Mr. Robert J. Crittenden
President
Project Control
17300 Henderson Pass, Suite 110
San Antonio, Texas 78232
(w/o enclosures)

Mr. William G. Hasbrook, Jr.
Zachry Construction Corporation
P.O. Box 240130
San Antonio, Texas 78224
(w/o enclosures)